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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON LEE MITCHEM,

Defendant and Appellant.

F061709

(Super. Ct. No. F09906557)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jason Lee Mitchem appeals from his conviction for receipt of stolen property on two grounds: (1) the trial court erred in admitting evidence that Mitchem was the target of a search warrant unrelated to the charges brought against him, and

(2) the trial court erred in finding that Mitchem's *Miranda*[1] waiver and statements made at a police interview were voluntary despite his being under the influence of methamphetamine at the time. Mitchem also contends the abstract of judgment must be corrected to reduce the amount of the security fees imposed, which the People concede. We affirm the judgment and direct the trial court to correct the abstract of judgment to reflect the proper amount for the court security fees imposed.

FACTUAL AND PROCEDURAL HISTORIES

On November 3, 2009, Fresno Police Department officers executed a search warrant at 629 East Alluvial in Fresno. The warrant was based on probable cause of finding evidence of narcotics sales.

Mitchem rented a room at that location and also used the garage for both storage and as an entertainment area with a couch, TV, and video-game console. A number of Mitchem's friends went to the garage, which remained unlocked. Police officers searching the residence found in Mitchem's room a plastic baggy containing a substance suspected to be crystal methamphetamine; a spoon, with what was later confirmed to be methamphetamine; and syringes.

In the garage, officers found what appeared to be a pipe used for smoking methamphetamine. Officers also found a number of items later confirmed to have been stolen from various victims. These items included several documents, checkbooks, notary materials, Fresno Police Department volunteer materials, and other items with identifying information of the victims on them.

Mitchem arrived home during the search. He immediately was arrested and searched incident to the arrest. Two plastic baggies containing what was later confirmed to be methamphetamine was taken from Mitchem's pocket.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Mitchem was charged with four counts: (1) receiving stolen property (Pen. Code, § 496, subd. (a)); (2) possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); (3) possession of an injection/ingestion device (Health & Saf. Code, § 11364); and (4) unauthorized possession of a syringe (Bus. & Prof. Code, § 4140). It was also alleged that Mitchem had served a prior prison term within the meaning of Penal Code section 667.5.

Defense counsel moved in limine to exclude any mention of the search warrant. The trial court conducted an Evidence Code section 352 analysis, concluding that the officers could state they searched the residence pursuant to a search warrant. They were not, however, permitted to mention the underlying basis of the warrant was based on probable cause for narcotics sales.

Also during the pretrial hearing, defense counsel moved to suppress Mitchem's statements made to Officer Craig Howard during a post-arrest interview at the police station. Counsel argued the statements were not voluntary because Mitchem was under the influence of methamphetamine at the time of the interview. The court conducted an Evidence Code section 403 hearing. Howard testified he had *Mirandized* Mitchem at the police station prior to interviewing him. Mitchem appeared calm and cooperative, answering all questions except one. Howard did not recall Mitchem ever telling him he was under the influence of methamphetamine. Howard did not test Mitchem for drugs and could not recall if he had checked whether Mitchem was under the influence.

Mitchem testified that he had been read and understood his *Miranda* rights. He was, however, still experiencing the effects of the methamphetamine he had ingested a few hours prior to the interview. He described the effects as "speed[ing] up your thought process and not think[ing] completely clearly …. It's a different euphoric feeling." He also testified that he was nervous and confused about what was going on. In addition, Mitchem intentionally refrained from telling Howard that he was under the influence of methamphetamine. Mitchem recalled some specific questions Howard asked him and in

what order the questions were asked. Further, Mitchem contradicted Howard's testimony relating to Mitchem's responses, including denying he told Howard everything in the garage belonged to him and that he knew the property was stolen. The trial court determined that Mitchem's waiver of rights and his subsequent statements were voluntary and declined to exclude his statements from trial.

Officer Howard testified at trial that he read Mitchem his *Miranda* rights and interviewed him at the police station. Howard then testified that Mitchem acknowledged he understood his rights; stated that Howard could ask him anything; and admitted that the methamphetamine found in his pocket, the spoon inside the bedroom, and the syringes belonged to him.

Howard testified that he questioned Mitchem about property in the garage and that Mitchem told him all of it belonged to him. When questioned about the stolen property found in the garage, Mitchem told Howard that someone named Ben had brought all the property to his house and that Mitchem believed the property was stolen. Howard asked Mitchem why he thought the property was stolen, but Mitchem refused to answer this question. It was the only question he refused to answer during the interview. Howard testified that Mitchem never told him anyone other than Ben and Mitchem stored property in the garage.

Mitchem testified at trial that he often ingested methamphetamine using a syringe. He ingested it in his bedroom, but also occasionally in the garage. The plastic baggies located in his pocket belonged to him and the syringes found in his bedroom belonged to him.

Regarding the stolen property in his garage, Mitchem testified that he did not know about it. He did not recall telling Howard everything in the garage belonged to him, but only that he had property in the garage. He also stated that he told Howard he assumed the property had come from Ben because Ben was the only one who had

accessed the garage in the time period where Mitchem would not have noticed the additional items in the garage.

Only one other witness testified for the defense. Mitchem provided to his counsel contact information for John Mastronardi shortly before trial. Mastronardi was added as a defense witness after the prosecution's case-in-chief had begun. Mastronardi testified that he had gone to Mitchem's garage several times, both before and after Mitchem's arrest and search of his residence. Although Mastronardi testified he had never seen items in the garage matching the stolen property, he often left items in Mitchem's garage, such as a bag of clothing or golf clubs, and the garage was left unlocked. Mastronardi also saw Ben bring property to the garage.

Mitchem's defense to the stolen property charge was that he had not known the items were in his garage. The only evidence contradicting his assertion was that of Officer Howard, who testified that Mitchem had told him someone named Ben had been bringing the property to the garage and that Mitchem believed the property was stolen.

During deliberations, the jury asked for clarification on various topics. They inquired about the purpose of the search warrant, whether Ben had been interviewed, and about the difference between possession and control. They also requested a read back of some of Howard's testimony, and later requested a read back of Mitchem's entire trial testimony.

After approximately five and a half hours of deliberations, including the read back of testimony described above, the jury reached a verdict of guilty on all counts. Mitchem admitted the prior prison term allegation. The trial court sentenced Mitchem to the aggravated term of three years on the stolen property charge and a consecutive middle term on count 2, plus the enhancement for the prior prison term, for an aggregate term of four years eight months. The trial court also imposed various fees and fines, including a court security fee for each conviction.

DISCUSSION

I. Admission of evidence regarding the search warrant

Mitchem asserts that the testimony involving the search warrant was irrelevant to the crimes charged and, even if relevant, was prejudicial in violation of Evidence Code section 352. He asserts that admitting this evidence was a violation of his fundamental due process rights. We disagree.[2]

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Evidence Code section 210 defines "relevant evidence" as "evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The Law Revision Commission Comments to this section note that, "under Section 210, 'relevant evidence' includes not only evidence of the ultimate facts actually in dispute but also evidence of other facts from which such ultimate facts may be presumed or inferred."

Evidence of the search warrant, though collateral to the crimes charged, was relevant to explain the legitimacy of the officers' presence at the residence. No further mention was made of the search warrant at any time, including during closing arguments. We conclude the trial court did not err in its implied finding that the evidence was relevant. (See *Alvarez*, *supra*, 14 Cal.4th at p. 215.)

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[2]Since we conclude the trial court did not commit error, Mitchem's federal due process claim also fails. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 20 (*Alvarez*).)

We next address the question of prejudice. Evidence Code section 352 states that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will … (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (See also *People v. Garceau* (1993) 6 Cal.4th 140, 176-177, abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) The trial court here astutely commented that *omission* of the search warrant as a basis for the search would "open[] up more speculation as to why [the police] were there."

"'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against … [one party] as an individual and which has very little effect on the issues.' [Citation.] Thus, the balancing process mandated by section 352 requires 'consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion.' [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 585.)

Mitchem's underlying concern appears to be that the search warrant evidence was unduly prejudicial based on how it was presented at trial contending that it was done in a manner that overstepped the trial court's pretrial hearing restrictions. He argues that the search warrant showed Mitchem was the sole target of the warrant. As a result, he argues the jury could have drawn the inference that Mitchem had a higher level of moral depravity than the evidence indicated. Alternatively, the jury could assume the search warrant was for the stolen property charge and infer that there was other evidence supporting Mitchem's guilt that was not brought out at trial.

During trial, defense counsel did not object to the testimony regarding the search warrant and made no effort to counteract its admission either in closing argument or in a request for a limiting instruction—a solution he now suggests could have remedied the

entire situation. As a result, we conclude he cannot now complain about the admission of the evidence. (*Alvarez, supra,* 14 Cal.4th at p. 215, fn. 19.) The People do not argue that Mitchem waived the argument on appeal, but rather address solely the propriety of the trial court's pretrial determination. Mitchem contends, preemptively, that defense counsel was ineffective to the extent he acquiesced to admission of the search warrant evidence. This claim also fails because there is no prejudice from the admission of the search warrant evidence.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

At trial, after the landlord and one of the stolen property victims testified, three police officers testified in succession regarding their involvement in searching Mitchem's residence, including the garage. Officer Howard testified first, stating that, "[m]yself and additional members of my team were serving a search warrant at 629 East Alluvial." He testified he made contact with the landlord who also resided there and inquired about Mitchem's room: "I informed her we were there to serve a search warrant and asked her if a subject by the name of Jason Mitchem lived there." He then described the drugs and related paraphernalia recovered from Mitchem's room before describing the items recovered from the garage. Later, Howard testified about his interview with Mitchem where Mitchem admitted to the drug and drug paraphernalia possession and also to Mitchem's belief that the property left by Ben in his garage was stolen.

Officers Pope and Fortune then testified. Pope stated, "[w]e were serving a search warrant at the Alluvial address, Mr. Mitchem's home." He described his involvement in searching Mitchem's bedroom and the drugs and related items found. Fortune then testified, "[w]e had served a narcotics search warrant at 629 East Alluvial," before going on to describe the items found in the garage, starting with the methamphetamine pipe.

The thrust of each of the officers' testimony was that, upon searching Mitchem's residence, they immediately found drugs and drug paraphernalia, which Mitchem himself later admitted belonged to him. The direct association between the search warrant and the description of the drugs and drug paraphernalia that were found immediately make it much more likely the jury inferred the search warrant was based on the drug charges—not the stolen property charge.

In response to the jury's question regarding the search warrant, the trial court referred to the general jury instruction requiring the jury to decide the facts based only on evidence presented at trial. This is essentially the same remedy Mitchem asserts would have corrected the deficiency in the first place, i.e., a limiting instruction on how the jury should consider the search warrant. The jury necessarily was limited to considering only the evidence presented at trial, and this evidence did not say anything about on what basis the search warrant was executed, except, at most, "narcotics," of which overwhelming evidence supported Mitchem's association.

In view of all the evidence that properly was admitted at trial regarding the stolen property charge, it is not reasonably probable a different outcome would have resulted had defense counsel objected to the search warrant evidence or requested a limiting instruction.

II. Voluntariness of Miranda waiver

Mitchem asserts the trial court erred in finding that his *Miranda* waiver and interview statements were voluntary even though he was under the influence of methamphetamine during the interview and contends the statements should have been

excluded. He argues the statements provided the only evidence of his knowledge the property was stolen and, thus, with their exclusion, the receipt-of-stolen-property conviction must fail.

"'*Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]' [Citation.]" (*People v. Combs* (2004) 34 Cal.4th 821, 845.)

Our Supreme Court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where … there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him." (*People v. Clark* (1993) 5 Cal.4th 950, 988, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Further, we have stated that "where the suspect has voluntarily ingested alcohol or a controlled substance at some point in time preceding arrest and, taking into account all of the surrounding circumstances, the evidence shows that a defendant understood and was able to intelligently respond to police questioning, the reviewing court will find a knowing and intelligent waiver …." (*People v. Loftis* (1984) 157 Cal.App.3d 229, 235-236 (*Loftis*).) "The critical question is whether the accused's abilities to reason, comprehend, or resist were so disabled that he was incapable of free, rational choice." (*Id.* at p. 236.)

In *Loftis*, we concluded the defendant's *Miranda* waiver was voluntary, knowing, and intelligent, even though the defendant was under the influence of PCP at the time he made the statements. The interviewing officer suspected the defendant was under the influence and conducted tests confirming his suspicion. Police officers testified at trial as to the effects of PCP on a defendant's ability to exercise rational intellect and free will, which was confirmed by medical studies. Thus, even though the defendant displayed signs of intoxication, we upheld admission of the statements since the defendant's answers were rational and directed to the questions.

Our Supreme Court has reached the same conclusion on similar facts. In *People v. Jackson* (1989) 49 Cal.3d 1170, 1189, the court noted in upholding the defendant's voluntary waiver of his *Miranda* rights that, "there is nothing in the record to indicate that defendant did not understand Detective Lee.… Lee testified that defendant's responses seemed normal and that he (Lee) did inquire whether defendant had been medicated. The cold record supports a finding of voluntariness." The court also observed, "[i]nsofar as defendant is claiming that he was incapacitated to waive his rights because of his ingestion of PCP and other drugs, he also cannot prevail. As we stated in *People v. Hendricks* (1987) 43 Cal.3d 584, '[the] mere fact of voluntary consumption of alcohol does not establish an impairment of capacity,' and here, as in *Hendricks*, the evidence showed that defendant was able to comprehend and answer all the questions that were posed to him. [Citations.]" (*Ibid.*)

Here, Mitchem admitted he voluntarily waived his *Miranda* rights. He recalled numerous details about the interview and directed answers to the specific questions asked. He never indicated that his statements were coerced by Officer Howard. To the contrary, he refused to answer Howard's question regarding why he believed the property was stolen. He purposely refrained from telling Howard he was under the influence of methamphetamine. Howard could not recall whether he evaluated Mitchem for being under the influence, but testified he usually took note if signs were obvious and would

have conducted tests had he felt Mitchem was exhibiting this type of behavior. The sum total of evidence presented about the potential for Mitchem's mental capacity to be overwhelmed was Mitchem's own testimony that the effect of being under the influence of methamphetamine was that "it would speed up your thought process and not think completely clearly …." Nothing in the record indicates that Mitchem's ability to reason, comprehend, or resist was so disabled that he was incapable of free choice. Ample evidence, however, supports the opposite conclusion.

Mitchem's reliance on *People v. Johnson* (1973) 32 Cal.App.3d 988 (*Johnson*) is misplaced. He mischaracterizes the scope of the expert testimony presented in that case. In *Johnson*, the defendant volunteered to undergo an interview while under the influence of sodium amytal, a "truth serum," to determine if he had killed his wife because he could not remember the event. (*Id.* at p. 1001.) Two medical experts testified at trial regarding "the extreme suggestibility of a person under the influence of sodium amytal," specifically, and that sodium amytal is not a universal truth drug. This meant that a person could lie while under its influence. Further, a subject's truthfulness while under the influence of the truth serum was an "all or nothing" situation where any evidence of untruthfulness would make the entire sodium amytal interview unreliable. (*Ibid.*)

Contrary to Mitchem's assertion that the idea of one false statement tainting an entire interview applies to "all cases involving the issue of involuntariness due to intoxication," the experts in *Johnson* did not opine about the unreliability of interviews conducted while under the influence of other drugs, but solely about the effects of sodium amytal. (*Johnson, supra,* 32 Cal.App.3d at p. 1001.) As a result, where there was conclusive evidence Johnson had lied while under the influence of sodium amytal, rendering all his statements unreliable, the *Johnson* court concluded Johnson's statements were involuntary and inadmissible. (*Id.* at p. 1002.) The court commented, "[t]he use of confessions obtained while a criminal defendant[] is in such an artificially suggestive state that his free will is overborne amounts to a denial of due process …." (*Ibid.*) No

evidence here indicates that Mitchem was in a similar artificially suggestive state or that his free will was overcome by his ingestion of methamphetamine.

We conclude the trial court properly found Mitchem's waiver and statements were voluntary, knowing, and intelligent.

III. Amending the abstract of judgment

Mitchem contends the abstract of judgment inaccurately reflects the proper amount for court security fees to be imposed pursuant to Penal Code section 1465.8 (section 1465.8). The People concede the issue. Although Mitchem in his reply brief contends the issue is moot since an amended abstract of judgment corrected the error, our review of the amended abstract of judgment indicates no correction had been made. The trial court imposed a court security fee of $30 per conviction at sentencing, but the abstract of judgment improperly reflects a fee of $40 per conviction.

Mitchem was convicted of the four counts on September 3, 2010. Section 1465.8 was subsequently amended to raise the fee from $30 per conviction to $40, effective October 19, 2010. (Stats. 2010, ch. 720, § 33.) Mitchem pleaded to an unrelated charge at the sentencing hearing held on November 5, 2010. The increased $40 fee applies to that conviction, but not to the four convictions of September 3. (See *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1414 [applicability of fee is to convictions occurring after relevant statute's effective date].) As a result, the correct amount of the total court security fees imposed should be $30 for each of the four jury convictions, plus $40 for the November 5 conviction, for a total of $160. We accept the People's concession and direct the trial court to amend the abstract of judgment.

DISPOSITION

The trial court shall amend the abstract of judgment to reflect the proper amount for the court security fees imposed and to provide an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Cornell, J.

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Franson, J.